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No. 85-998

In the Supreme Court of the United States

OCTOBER TERM, 1986

UNITED STATES OF AMERICA, PETITIONER

v.

RONALD DALE DUNN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In our opening brief, we showed that a narrow interpretation of "curtilage" would best comport with the common law roots of that concept and this Court's decisions. We also suggested that, in order to make the concept concrete and easily understood, this Court should adopt a bright-line rule that the curtilage extends no farther than the nearest fence surrounding a house. Finally, we argued that the decision of the court of appeals could not stand even if the Court chose to apply a balancing test rather than a bright-line rule. Respondent has not seriously challenged the bulk of our analysis. The points that he does make lack merit.

1. Respondent places much emphasis on his contention that the actions of the law enforcement officers in this case constituted a trespass under Texas law (Resp. Br. 2-3, 4, 6, 7, 11-13). Respondent appears to be arguing that a trespass, without more, is a Fourth Amendment violation. That argument, however, was squarely rejected in *Hester* v.

United States, 265 U.S. 57, 58 (1924), and *Oliver* v. *United States*, 466 U.S. 170, 183-184 (1984).[1] For the reasons stated in our opening brief, the officers' actions in peering into respondent's barn did not violate the Fourth Amendment. That is true whether or not the officers violated the Texas law of trespass.

It is nonetheless of some interest to note that, contrary to respondent's assertion, Texas law appears to recognize the performance of law enforcement duties as a justification for what would otherwise be a trespass. In cases coming from Texas, the Fifth Circuit has applied the general rule that, "[w]hen the performance of his duty requires an officer of the law to enter upon private property, his conduct, otherwise a trespass, is justifiable." *Giacona* v. *United States*, 257 F.2d 450, 456, cert. denied, 358 U.S. 873 (1958); accord *United States* v. *Knight*, 451 F.2d 275, 278 (5th Cir. 1971), cert. denied, 405 U.S. 965 (1972). No reported decision from any Texas court or any federal court applying Texas law is to the contrary.[2]

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[1]Respondent bases his argument in part on the dangers posed by landowners who might use force to repel what they perceived as a trespass by law enforcement officers (Resp. Br. 12). The Court in *Oliver*, however, firmly rejected a rule that would treat all trespasses as Fourth Amendment violations, even though the dissent pointed to the dangers that might be posed by "irate landowners" using "self-help" (466 U.S. at 195 n.19).

[2]Respondent incorrectly states (Resp. Br. 13) that the court found a violation of Texas trespass law by agents of the Internal Revenue Service in *United States* v. *Hylton*, 710 F.2d 1106 (5th Cir. 1983). In fact, the court in that case merely held that, in light of the First Amendment right to petition the government for redress of grievances, a property owner was not criminally liable for filing criminal trespass complaints against IRS agents who had entered her property on law enforcement business. The court acknowledged "the fact that the agents may have a valid defense" to the trespass charges but left evaluation of the defense to the state courts in the trespass proceeding (710 F.2d at 1111 n.7).

2. As we suggested in our opening brief (Gov't Br. 13), and as respondent confirms, a barn is a repository of hay or feed, animals, machines, and other equipment, built some distance from the house because of the noxious effects of "small varmints, flammable materials, and odors" (Resp. Br. 5). There is no tenable basis to assert that a building of that character is an area involving "intimate activities associated with family privacy" (*Dow Chemical Co.* v. *United States,* No. 84-1259 (May 19, 1986), slip op. 9) or "the area to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life' " (*Oliver*, 466 U.S. at 180).

Respondent, however, claims Fourth Amendment protection on a different basis: that the barn was "an essential part of [his] business" (Resp. Br. 9). It is, perhaps, a nice constitutional question whether a barn on a farm or ranch but outside the curtilage of the home is entitled to the same constitutional protection as a commercial building where one might more readily expect to find "private" matters.[3] That question, however, does not have to be resolved in this case.

Even assuming the barn in this case was entitled to the same Fourth Amendment protection as an office or factory, the actions of the law enforcement officers still did not violate the Fourth Amendment. The law enforcement agents peered into the open side of the barn from outside;

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[3]See *Norman* v. *State*, 379 So. 2d 643, 647 (Fla. 1980) (barn protected as part of the farmer's business); *State* v. *Vicars*, 207 Neb. 325, 329-330, 299 N.W.2d 421, 425 (1980) (shed held to be within curtilage because it was used in family farming operation). Even assuming that these cases were correctly decided, they provide no comfort to respondent, who was not in fact carrying on the business of farming or any other legitimate business on his ranch or in his barn; the barn was used exclusively as a drug laboratory (see Gov't Br. 21).

they did not enter the barn.[4] This Court has made it clear that "observation * * * *without* physical entry" of a business facility is permissible (*Dow*, slip op. 9). A government official making visual observation of commercial buildings from outside those buildings "may operate within or without the [business] premises but in either case he is well within the 'open fields' exception to the Fourth Amendment." *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974).[5] Naked-eye observations and other uses of the senses from outside a structure are permitted as long as the observer is not within the curtilage. See, *e.g.*, *United States* v. *Williams*, 581 F.2d 451, 454 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979); *United States* v. *Brown*, 487 F.2d 208, 209-210 (4th Cir. 1973), cert. denied, 416 U.S. 909 (1974); *Fullbright* v. *United States*, 392 F.2d 432, 434 (10th Cir.) ("observations from outside the curtilage of activities within are not generally interdicted by the

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[4]The officers, looking into the barn at night, used flashlights. The use of flashlights did not convert their naked-eye observations into an illegal search. *Texas* v. *Brown*, 460 U.S. 730, 739-740 (1983) (plurality opinion); *United States* v. *Lee*, 274 U.S. 559, 563 (1927); *United States* v. *Hernandez*, 715 F.2d 548 (11th Cir. 1983), cert. denied, 465 U.S. 1009 (1984).

[5]In *Dow*, the Court noted that the chemical company had not taken precautions against aerial observation (slip op. 9-10 n.4), and that the observation was undertaken from the public airspace (*id.* at 12). Similarly, in *Western Alfalfa Corp.*, the Court noted that "[t]he field inspector was on respondent's property but we are not advised that he was on premises from which the public was excluded" (416 U.S. at 865). As the language from *Western Alfalfa Corp.* quoted in text suggests, however, the decisions cannot be limited to the situation in which the visual observation of a business facility is undertaken from a place from which the public has not been excluded. The Fourth Amendment does not protect the area surrounding a house just because the homeowner has taken steps to exclude the public (*Oliver*, 466 U.S. at 182 & n.13). The Fourth Amendment therefore cannot protect the area surrounding a business facility, in which an expectation of privacy exists but is significantly less than that in the home (*Dow*, slip op. 10), just because the business owner has taken steps to exclude the public.

Constitution"), cert. denied, 393 U.S. 830 (1968); *United States* v. *Sims*, 202 F. Supp. 65, 66 (E.D. Tenn. 1962); cf. Gov't Br. 9 n.3 (citing cases in which observation into the home itself was upheld). Since "the intimate activities associated with family privacy and the home and its curtilage simply do not reach the outdoor areas or spaces between structures and buildings" of a business facility (*Dow*, slip op. 9), the business structure has no curtilage, and the Fourth Amendment does not prohibit naked-eye observations from the ground surrounding the structure.

3. Respondent argues for a Texas-specific curtilage rule, noting that "what seems large in another state is but a normal distance in Texas" (Resp. Br. 8). Respondent takes issue with our suggestion that the curtilage should extend no farther than the fenced-in area around a house, if there is a fence, but should not extend to the entire fenced-in area around a house if that area is large (*ibid.*). The courts of Texas itself, however, have described the curtilage as " 'a fence or inclosure of a small piece of land around a dwelling house.' " *Cantu* v. *State*, 557 S.W.2d 107, 109 (Tex. Crim. App. 1977) (quoting *Worth* v. *State*, 111 Tex. Crim. 288, 290, 12 S.W.2d 582, 584 (1928)). And, as we noted in our opening brief (Gov't Br. 22), the barn in this case was half a football field away from the house. We submit that such a distance, even in Texas, is larger than the area reserved for intimate activities associated with family privacy.

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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